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    - PC: conclusive
    - Expertise: a PC is indicative of expertise
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    - If no PC: correctness
    - Effect: applicant has burden of showing unreasonableness

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Constitutional implications

- La Forest (majority): An AT's enabling statute must explicitly or implicitly grant jurisdiction to interpret and apply the Charter.
- Lamer: Mere creatures of legislature, whose members usually serve at the pleasure of the government, and whose decisions may at times be properly governed by guidelines established by the executive, are not suited to the task of interpreting the Charter.
- McLachlin and LHD (dissenting): The Charter belongs to the people. Many more citizens have their rights determined by ATs than by the courts; if the Charter is to be meaningful, it must find its expression in the decisions of these ATs. If the legislature has conferred to the AT the power to decide questions of law, then that power must extend to the Charter, and to the question of the constitutional validity of provisions in its enabling statute.
    - Note: This dissent is adopted in NS v Martin.
    - Note: The BC ATA may determine an AT's jurisdiction over constitutional questions (s 44) or constitutional questions relating to the Charter (s 45).

REMEDIES

Example of Statutory Appeal

- The *Immigration Act* contains a provision allowing JR, with a leave requirement from the FCTD. The FCTD judgment can only be appealed if the FCTD certifies a "serious question of general importance" for the FCA to consider. The SCC then exercises its discretion whether to give leave for JR from the FCA.

Examples of AT Remedies

- The enabling statute explicitly or implicitly determines availability of remedies that may be awarded by an AT.
    1. Administrative: An AT may be able to make a declaratory order for enforcement of an obligation/duty, mandamus, quo warranto, ongoing seizin, an internal appeal, or for reconsideration or rehearing of an issue (perhaps with a differently constituted panel, if independence/impartiality an issue).
    2. Constitutional: An AT may refuse to apply provisions in its enabling statute, by virtue of s 52 (non-application of law that is inconsistent with the Constitution) or may award just and equitable remedies under s 24(1).
    3. Civil: An At may order costs, compensation, damages, fines, or restitution.
    4. Non-legal: An AT may order mediation, consultation, education, monitoring, policy changes, or equitable remedies.

Name	Translation	Effect
Certiorari	cause to be certified	quash or invalidate an order or a decision
Prohibition	prohibit	prevent the unlawful assumption of jurisdiction or halt the proceedings where unlawful jurisdiction is being exercised
Mandamus	we command	order a duty to be performed BUT cannot tell tribunal how to decide
Certiorari + Mandamus	The most common administrative law remedy	send back (with directions) for reconsideration
Declaration	statement of legal position	public law = declare action ultra vires (outside jurisdiction) not enforceable but usually obeyed
Habeas corpus	produce the body	ensure detention is not arbitrary
Quo warranto	by what authority?	challenge basis of authority used to justify acts

Ontario v McKinnon, 2004 ONCA
Novel tribunal remedies; ineffective tribunal remedies
Enforcement of remedies
- The remedies granted by the AT were "novel": prospective, open-ended, and subject to ongoing revision and elaboration.
- The AT remained seized of the matter until the entire series of orders was implemented and the complainant's remedial right was met with full compliance and substantial conformity.

Domtar v Québec, 1993 SCC
The discretionary nature of judicial review
- Courts do not have a monopoly on the rule of law. Neither the need for certainty in the law nor consistency in decision-making can justify broad intervention on rule of law grounds.
- Inconsistent or conflicting interpretations by different administrative bodies do not provide an independent ground for JR.

McDonald v Anishinabek Police Service, 2006 ONSCJ
The availability of judicial review: the threshold test
- Is the administrative body exercising a public function or does the decision have public law consequences?
- Prerogative writs are available to supervise the general machinery of government, even if not constituted by statutory power. If the administrative body fulfills a public function OR if the decision has public law consequences, then, the duty of fairness applies AND the decision is subject to JR.

Harelkin v University of Regina, 1979 SCC
The availability of judicial review: all adequate means of recourse must be exhausted
- The courts should not use their discretion to promote delay and expenditure unless there is no other way to protect a right.

Canada (AG) v Telezone, 2010 SCC
Private law remedies: if you want a private law remedy, must pursue a private law action
- Public law principles are directed at: legality, reasonableness, fairness, good governance, rule of law, and adherence to the Constitution.
- The discretionary nature of supervisory jurisdiction reflects this different orientation.
- Private law principles are directed at: righting private wrongs via compensation or other forms of relief.

R v Conway, 2010 SCC
Charter jurisdiction, including remedies under s 24(1) and s 52
- **Framework for determining Charter jurisdiction**
  1. Does this tribunal have the jurisdiction to decide **questions of law**? Answer must be yes.
  2. Does the statute give **express or implied** jurisdiction? Answer must be yes.

4. Has the **legislature clearly intended to withdraw** jurisdiction? Answer must be no. The tribunal can grant **s 24 and s 52 remedies** for Charter issues. BUT, for s 24(1), must also ask:
5. Can the tribunal grant this particular remedy? The answer must be yes. Look to the statutory scheme to determine legislative intent that such a remedy would fulfill the statute's purposes and the tribunal's function.

PROCEDURAL FAIRNESS

THE RIGHT TO BE HEARD: THE DUTY OF FAIRNESS

The duty of fairness entitles individuals affected by an administrative decision to:

1. The right to be heard AND
2. The right to an impartial and independent hearing.

The correlative obligations require the decision maker to:

1. Hear the other side before deciding: the rule of *audi alteram partem*, AND
2. Not to be a judge in his own cause: the rule of *nemo judex in sua causa*.

- Fairness is a CL concept, and may be limited or ousted by legislation, subject only to Charter compliance. BUT, courts will require specific legislative direction before concluding that this has occurred.
- If the statute is silent, courts will presume that the legislature intended procedural protection to apply. The CL duty of fairness supplements existing statutory duties and fills the gap where none exist.
- The content of the duty is informed by the context of the decision. The duty may be satisfied by different protection in different contexts depending what the duty requires in the circumstances.
- S 7 of the Charter provides a constitutional basis for procedural protection, but this right applies in a narrower range of circumstances than the duty of fairness.

Two questions arise when JR proceedings are brought, alleging a breach of the duty of fairness:

1. Has the **threshold** test been met? This will determine if a duty of fairness is owed.
2. If so, what is the **content** of the duty? This will determine what the duty of fairness requires in the circumstances.

Courts require decisions about the threshold and the content to be made correctly. If they are not, the substantive decision at issue will be remade in accordance with the appropriate procedures.

- An order quashing a decision for a breach of the duty of fairness does not, in theory, affect the substantive decision that may be made subsequently. It only means that the decision must be remade with the appropriate procedural protection in place.
- BUT, success on an application for JR on fairness grounds will give the applicant another chance to obtain a preferred substantive outcome, and ensure that the substantive decision will be made on a well-informed basis. Even if the same substantive decision is reached, it will have the same legitimacy.

BACKGROUND

Nicholson v Haldimand-Norfolk (Regional) Police Commissioners, 1979 SCC
Modern CL development

- A general duty of procedural fairness applies to administrative decisions.

Cardinal v Director of Kent Institution, 1985 SCC
Threshold test: Is a duty of fairness owed?

- At CL, there is a duty of procedural fairness upon every **public authority** making an **administrative decision** that is **not of a legislative nature** and **that affects the rights, privileges, or interests of an individual**.
- Note: There is little dispute about the meaning of the terms rights, privileges, or interests: they are not meant to limit the availability of fairness protection but to expand the range of decision subject to the duty of fairness.
- The denial of a right to fair hearing must always render a decision invalid, regardless of whether a reviewing court concludes that the hearing would have resulted in a different decision.

EXCEPTIONS/LIMITATIONS

The duty does not apply to:

1. Legislative decisions or functions:

Note: The underlying rationale is that governments are elected to make policy decisions and must be allowed to do so, provided they comply with relevant constitutional requirements.

- **Re Canada Assistance Plan (BC)**: The rules governing procedural fairness do not apply to a body exercising purely legislative functions.

Cabinet and ministerial decisions, if they can be characterized as legislative in nature:

- **AG of Canada v Inuit Tapirisat**: Although the line between legislative and administrative functions is not always easy to draw, where the executive has been assigned a task previously performed by the legislature, and where the subject matter is not an individual concern or a unique right, different considerations apply.

Note: In this case, Cabinet was treated as though it was Parliament or the legislature.

- **Re Canada Assistance Plan (BC)**: A purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection, and any attack upon such a decision will have to be founded upon abuse of discretion. Similarly, public bodies exercising legislative functions may not be subject to judicial supervision.
- Note: In this case, purely ministerial decisions were treated as though they were made by Parliament or the legislature.

Subordinate legislation:

- Exception = **Homex Realty v Wyoming (Village)**: The passing of a municipal bylaw was made subject to the duty of fairness, because it was clear that the motivation for its passing was an ongoing dispute with a particular developer; the village was not permitted to couch its actions in a form designed to oust the application of the duty of fairness.

Policy decisions, and decisions that are general in nature:

- **Martineau v Matsqui**: A purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection.
- **Knight v Indian Head School Division**: Many administrative bodies have been required to assume duties traditionally performed by legislatures. There is a distinction between "decisions of a legislative and general nature" and "acts of a more administrative and specific nature."
- **Wells v Newfoundland**: Legislative decision making (the passing of primary legislation) is not subject to the duty of fairness. Legislatures are subject to constitutional requirements for valid lawmaking, but within those boundaries, they can do as they see fit, and are subject to review only by the electorate.

2. Public office holders employed under contracts:
   a. **Dunsmuir**: If the terms of an individual's employment are governed by contract, then ordinary private law contractual remedies will apply in the event of dismissal, regardless of the public nature of the employment concerned.
3. Emergencies:
   a. **Cardinal v Kent Institution**: The process of prison administration, because of its special nature and exigencies, should not be unduly burdened by the imposition of unreasonable procedural requirements.

CONTENT

Knight v Indian Head School Division, 1990 SCC

- The duty of fairness is entrenched in the principles governing our legal system. However, the needs of ADMs must be respected.
- Every administrative body is the master of its own procedure and need not assume the trappings of a court.
- The aim is not to create procedural protection, but to achieve balance between the need for fairness, efficiency, and predictability of outcome.

Baker v Canada (Minister of Citizenship and Immigration), 1999 SCC

Modern test to determine the content of the duty of fairness

- **Baker factors** (non-exhaustive, none are necessarily determinative):
  1) **Nature of the decision and the process followed in making it.**
     Consider process, function, and nature of the AT:
     Adjudicative/criminal/judicial/individual = more PF
     Administrative/regulatory/polycentric = less PF
  2) **Nature of the statutory scheme and the terms of the enabling statute/overarching statute.**

Second level of proceeding, such as SROA = more PF (indicative of legislative intent for AT to be subject to review; to allow meaningful participation, reasons will be required if there is a SROA)
Procedural safeguards elsewhere in the act/regulations = more PF (indicative of legislative intent to provide increased PF)
Exception to the statutory scheme = less PF

3) **Importance of the decision to the individual affected.**
Important = more PF (employment: Blencoe, security of the person: Suresh/Singh, reputation: Blencoe, children: Baker,
Less important = less PF

4) **Legitimate expectations of the individual challenging the decision.**
Consider the conduct of public authorities in particular circumstances.
Legitimate expectations of procedural protection may arise out of the conduct of public officials such as representations, promises, or undertakings, or out of the past practice or current policy of a decision-maker: Mavi.

5) **Measure of deference to the administrative body's choice of procedure.**
Statute confers ability to determine own procedures = less PF
AT has expertise in determining appropriate procedures = less PF (like in Kent)
Institutional constraints that may require decisions to be made quickly/cheaply/safely = less PF (like in Kent)

❖ Decision-makers have a duty to give reasons whenever important interests are at stake, whenever there is a statutory right of appeal, or in other circumstances.

SPECIFIC COMPONENTS

Baker v Canada (Minister of Citizenship and Immigration), 1999 SCC

❖ Affected persons should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decisions.

Canada (AG) v Mavi, 2011 SCC

The content of the duty of fairness varies with the circumstances
Legitimate expectations

❖ The requirements of the duty are driven by their particular circumstances. The overarching requirement is fairness.
❖ Binnie: Where a government official makes representations, within the scope of her authority, to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous, and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker's statutory duty.

Notice

The general rule is that notice must be adequate in all circumstances in order to afford a reasonable opportunity to present evidence and arguments, and to respond to evidence and arguments presented in opposition.

Consider:

- Who is making the decision? What is its nature? When, where, why, and how?
- Was the notice provided timely, in the sense that it provided adequate time to respond?
- Did the notice provide sufficient information to allow an informed response?

Disclosure

The duty of fairness is satisfied if a party has sufficient information to make informed submissions regarding the matter at issue.

It is often argued that disclosure obligations must be limited by the needs of the particular authorities or the rights of other individuals. Ex: In parole hearings/prison discipline cases = concerns about safety of informants/need to keep identity secret; cases involving sensitive national security information.

BUT, the duty to disclose can be adapted: information can be vetted by a court to determine its relevance and materiality, and may be disclosed only to counsel, with instructions limiting its further dissemination, or like in Charkaoui, where the court recommended a special advocate.

Oral hearings

Oral hearings are often demanded, but seldom required. They are not usually necessary to reaching an informed decision and there are good reasons for not granting them, including expense and delay.

Singh v Minister of Employment and Immigration, 1985 SCC
Oral hearings
- Oral hearings are not always required. However, where credibility is at issue, fundamental justice requires an oral hearing.
- The interests protected under s 7 are of such importance that an oral hearing will generally be required when those interests are engaged. Procedural fairness is a POFJ.
- *Everyone* in s 7 includes *any* person who is physically present in Canada, including non-citizens.

Right to counsel

BC (AG) v Christie
- There is no general constitutional right to counsel in administrative proceedings.

Right to call evidence

The right to call and cross-examine witnesses is normally part of the right to an oral hearing. BUT, the right is not absolute.
Ex: S 38(2) of the BC ATA provides rights to cross-examination while permitting tribunals to limit examination and cross-examination to what they consider sufficient in the circumstances.

Timeliness and delay

Blencoe v BC (Human Rights Commission), 2000 SCC
Timeliness and delay
- In some circumstances, delay in the administrative process may rise to the level of a deprivation of liberty or security of the person under s 7, which would result in a violation if the deprivation were not in accordance with the POFJ.
- **Delay may result in a breach of fairness. The remedy would be an order for an expedited process.**

Reasons

Does the duty of **fairness require an AT to give reasons for its decision?**
- Check the **relevant statute and procedural code** for a reasons requirement
- If none, **apply the Baker factors** to determine the content of the duty
- If duty exists, **no deference** will be owed to the tribunal in its choice not to give reasons
- **Fairness** is the appropriate standard
- Remedy = quash the decision and send back for re-determination with reasons
- Reasons further public confidence, accountability and transparency in decision-making
- Principles satisfied: democracy, rule of law, accountability, good or responsible government

Baker v Canada (Minister of Citizenship and Immigration), 1999 SCC
Reasons
- Decision-makers have a duty to give reasons whenever important interests are at stake, whenever there is a statutory right of appeal, or in other circumstances.

Reasons are required if a particular decision has important significance for an individual, because public actors demonstrate respect for those affected by their decisions by justifying the decisions they make.

Reasons are also required if a statutory appeal process exists to facilitate the workings of that process. It is difficult or impossible to determine whether to appeal a decision and what kind of arguments to make on appeal, if no explanation is provided for the decision.

Newfoundland and Labrador Nurses v Newfoundland and Labrador (Treasury Board), 2011 SCC
Reasons
- The absence of reasons is a matter of procedural fairness; the adequacy of reasons is a matter for substantive review.
- The function of reasons:
    - Disclose expertise "using concepts and language often unique to their areas and rendering decisions that are often counter-intuitive to a generalist"

- Justify the decision using transparent, intelligible, and reasonable reasoning understandable to all [e.g., losing party, counsel, other agencies, reviewing court, media, general public]
- Illustrate that the outcome is reasonable, especially when more than one reasonable result is possible

❖ Adequate reasons:
- Exhibit "justification, transparency and intelligibility" (*Dunsmuir*)
- Permit the parties to understand why the tribunal made the decision
- Facilitate the appeal process and judicial review
- Satisfy the reviewing court that the tribunal grappled with the substantive live issues
- Allow the reviewing court to understand how outcome is within the range of acceptable outcomes

❖ Inadequate reasons:
- Bare conclusions with no supporting information
- Opaque conclusions
- No intelligible path to conclusions
- Conclusions not supported by principles
- Glaring inconsistencies
- Lack of evidence
- Irrelevant considerations / relevant considerations omitted
- Minimal reasons which effectively immunize from review and accountability
- Exhibit attitude of "Trust us, we got it right."

AB (Information and Privacy Commission) v AB Teachers' Association, 2011 SCC

Reasons

❖ The concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision: Dunsmuir.

❖ However, the direction that courts are to give respectful attention to the reasons "which could be offered in support of a decision" is not a carte blanche to reformulate a tribunal's decision in a manner that ignores an unreasonable chain of analysis in favour of the court's own rationale. Moreover, this direction does not dilute the importance of giving proper reasons for an administrative decision.

❖ Deference under the reasonableness standard is best given effect when ADMs provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided. Nonetheless, this is subject to a duty to provide reasons in the first place.

❖ **When there is no duty to give reasons or when only limited reasons are required, it is entirely appropriate for courts to consider the reasons that could be offered for the decision when conducting a reasonableness review.**

❖ In some cases, the reviewing court may not be able to adequately show deference without first providing the decision maker the opportunity to give its own reasons for the decision. It will generally be inappropriate to find that there is no reasonable basis for the tribunal's decision without first giving the tribunal an opportunity to provide one.

❖ Reasons given by a tribunal in other decisions on the same issue can assist a reviewing court in determining whether a reasonable basis for an implied decision exists.

PROCEDURAL FAIRNESS AND THE CHARTER

Singh v Minister of Employment and Immigration, 1985 SCC

Source and scope of s 7

❖ The legislation specifically denied an oral hearing, but one was required by s 7. If the statute is explicit, it stands, unless a successful Charter argument can be made.

❖ Oral hearings are not always required. However, where credibility is at issue, fundamental justice requires an oral hearing.

❖ The interests protected under s 7 are of such importance that an oral hearing will generally be required when those interests are engaged. Procedural fairness is a POFJ.

Suresh v Canada (Minister of Citizenship and Immigration), 2002 SCC

CL framework

❖ Minimum procedures required in the context of a person facing deportation to torture under s 53(1)(b): disclosure, participation, and reasons.

❖ In this case, the procedures were declared unconstitutional. The remedy was an order for reconsideration with proper procedures.

Principle: Be informed of the case to be met

- Includes CIC memoranda that Minister upon which decision is based

- Subject to privilege or other valid reasons for reduced disclosure

Principle: Opportunity to respond to case presented to Minister

- Person must be provided with materials being used against him/her
- Then affected individual provides written submissions in response
- Minister must consider these submissions along with others

Principle: Opportunity to challenge Minister's information re validity of the decision

- Present evidence showing presence not detrimental to Canada despite evidence of association with terrorist org.
- Present evidence regarding risk of torture
- Present evidence and submissions about value of written assurances from foreign government that will not torture

Duty: Give reasons

- Minister must provide responsive written reasons
- Reasons must articulate clearly why the person is considered a danger to Canada's security [subject to privilege or other valid legal limits]
- Must be from the person making the decision: the Minister

Section 1:

- Valid objectives do not alone justify infringements
- Limitations are not connected to the objective
- Limitations are not proportionate to the harm
- BUT extraordinary circumstances will justify deportation to torture [the "Suresh exception"]

Charkaoui v Canada (Minister of Citizenship and Immigration), 2007 SCC

Content

❖ Parliament need not create perfect procedures.
❖ Deference is owed in assessing legislative choices in s 1.

Canada (PM) v Khadr, 2010 SCC

Breach

❖ Though the FC and the FCA ordered the federal government to request Khadr's repatriation as a remedy for breaching his s 7 Charter rights, the SCC declined to go so far, holding that although Khadr's rights had been violated, it was for the federal executive, and not the courts, to decide how to best provide a remedy for that breach.

THE RIGHT TO AN INDEPENDENT AND IMPARTIAL DECISION MAKER

❖ *Independence*: A means of achieving impartiality.
❖ *Impartiality*: The ability to make decisions without improper influence.
❖ *Bias*: The reasonable perception of partiality (undue preferential treatment).

Independence serves to preserve confidence in public decision-makers, the administration of justice, and the rule of law.

INDEPENDENCE

Ocean Port Hotel v British Columbia (GM, Liquor Control and Licensing Branch), 2001 SCC

Sources and definitions of independence

❖ There is no constitutional guarantee for AT independence.
    - Judicial independence protects the judiciary from interference by the executive. By contrast, ATs are not intended to be separate from the executive.
    - ATs are created precisely for the purpose of implementing the policies of the executive; their function as policymakers and their status as extensions of the executive make the degree of their independence a matter to be determined by the legislature.
❖ It is up to the legislature to determine the structure, responsibilities, and degree of independence required of any particular tribunal.
❖ AT independence is a CL principle, and can therefore be ousted by express statutory language, as long as the statute is constitutionally valid.
❖ Statutory presumptions:
    - If the statute is silent, courts will infer that the legislature intended procedural fairness, and will import the procedural safeguards demanded by the CL.
    - If procedural fairness is clearly ousted by express statutory language, then the statute will prevail, unless a constitutional challenge is made.

Canadian Pacific Ltd v Matsqui Indian Band, 1995 SCC

Judicial vs administrative independence

Lamer CJ	Sopinka J
Principles of natural justice apply to Band tribunals and are flexible	Agrees
Context of Aboriginal self-government does not change force of these principles ➢Members of appeal tribunals perform adjudicative functions not unlike courts	Disagrees + different approach to statutory interpretation
Tribunal members appear to lack sufficient independence as a structural condition ➢Present case before members appointed by those who oppose claim	Defer application of test until have operational knowledge —therefore cannot apply principles
Discretionary appointment by Band Chief and Council with no protection from arbitrary dismissal	---
No security of tenure	---
No security of remuneration	---
Allegations of lack of impartiality/bias are speculative	Agrees
Appeal tribunals are not an adequate remedy	Yes they are

IMPARTIALITY

Allegations of reasonable apprehension of bias (RAB) exist in two major forms:

1. Perceptions of individual bias, which deal with the impartiality of individual decision-makers, and
2. Perceptions of institutional bias, which deal with whether reasonable perceptions of partiality regarding the decision-making body as a whole can be raised in a substantial number of cases.

The grounds for the apprehension of bias must be substantial; a real likelihood or probability of bias should be demonstrated. Mere suspicion of bias is insufficient for the test to be met.

Committee for Justice and Liberty v National Energy Board, 1978 SCC

Test for the reasonable apprehension of individual bias

DeGrandpré, in dissent (however, test has been used consistently by the courts):

- Would a reasonable, well-informed person, having thought the matter through, would conclude that an ADM is sufficiently free of factors that could interfere with her ability to make impartial judgments?

Chrétien v Canada (Ex-Commissioner, Commission of Inquiry into the Sponsorship Program and Advertising Activities)

Example of personal bias: attitudinal predisposition toward an outcome

International Woodworkers v Consolidated Bathurst, 1990 SCC

Institutional bias: full board meetings

- The test for independence is the freedom to decide according to one's conscience and opinions, not the absence of influence.
- The relevant issue is whether there is pressure on the decision-maker to decide against her own conscience and opinions.
- Generally, the use of full board meetings will not breach the principles of natural justice if:
  1. Discussions are limited to law or policy, and not factual issues, and
  2. The parties are given an opportunity to respond to any new ground arising from the meeting.
- Appropriate checks and balances for full board meetings include not keeping minutes, not keeping attendance, not holding a vote, not requiring consensus, and having attendance be voluntary.

Geza v Canada (Minister of Citizenship and Immigration), 2006 FCA

Institutional bias: lead cases

- Two-part test for determining reasonable apprehension of institutional bias (systemic bias in a substantial number of cases)
  1. Considering a number of factors including, but not limited to, the potential for conflict between the interests of tribunal members and those of the parties who appear before them, will there be a reasonable apprehension of bias in the mind of a fully informed person in a **substantial number of cases**?
  2. If the answer is no, the allegations of apprehension of bias cannot be brought on an institutional level, BUT, may be dealt with on an ad hoc basis, using the test for individual bias.
- The evidence did not prove that the perceived decline in acceptance rates was a direct result of the lead case. Even if a direct result could be established, this would not support an allegation of apprehension of bias. If IRB members appropriately cite the lead case in deciding on the merits of a particular refugee claim, there can be no complaint. If IRB members apply the lead case

inappropriately, this does not contribute to a finding of apprehension of bias; it is simply erroneous decision-making subject to JR.

SUBSTANTIVE REVIEW

BACKGROUND

Pre-Dunsmuir (three standards):

1. Correctness.
   An incorrect decision is one that is different from the one arrived at by the reviewing court.
2. Reasonableness simpliciter.
   Southam: An unreasonable decision is one that is not supported by any reasons that can stand up to a somewhat probing examination, or in other words, if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. This determination requires an inquiry into the evidentiary foundation or the logical process on which the conclusion is based.
3. Patent unreasonableness.
   Ryan: A patently unreasonable decision is one that suffers from a serious and obvious defect, one so flawed that no amount of deference can justify letting it stand.

Dunsmuir (two standards):

1. Made the standard of review analysis more coherent and workable, by merging the two deferential standards into one reasonableness standard.
2. Simplified the selection of the appropriate standard of review, by creating a two step framework called the standard of review analysis to replace the pragmatic and functional analysis.

PRIVATIVE CLAUSES

Privative clauses present a conundrum for the traditional conception of the rule of law:

1. A legislative grant of authority is always circumscribed by the terms of the statute. The CL presumes that citizens will have access to the courts to ensure that ADMs do not exceed or abuse the power granted to them. In this way, ADMs, as government actors, can be held accountable to the courts.
2. BUT, the doctrine of parliamentary supremacy dictates that the legislature enacts the law, and the court must interpret and apply the law in accordance with legislative intent.

Privative clauses put these two principles in opposition with each other by stating that the legislature intends to oust the courts from supervising the actions of the ADM.

THE STANDARD OF REVIEW

CUPE v New Brunswick Liquor Corporation, 1979 SCC

The concept of jurisdiction

The shift toward curial deference: beginning of the end of the Diceyan model for administrative law in Canada

- The presence of a privative clause indicates legislative intent to empower an AT to decide certain matters. ATs are not merely "inferior tribunals", but specialized bodies possessing a legislative mandate to apply their expertise and experience to matters that they may be better suited to address than an ordinary court.
- Deference is required in the proper circumstances, considering the relative expertise of the ADM and the legislative intention in creating the ADM. In cases of statutory ambiguity, where there are multiple interpretations that are reasonable, a reviewing court should defer to the interpretation of the expert tribunal.
- The question of what is and what is not jurisdictional is often very difficult to determine. The courts should not classify matters as jurisdictional, and therefore subject to broader curial review, that are doubtfully so.
- If ADMs are acting within their jurisdiction, the standard of review is patent unreasonableness. If ADMs are not acting with their jurisdiction, the standard of review is correctness.

Note: This decision was a major shift in the approach to judicial review, by i) reconfiguring the application of the doctrine of jurisdictional error, and ii) recognizing that ATs may possess expertise and a statutory mandate that make them better suited to the interpretive task than the generalist judge.

UES, Local 298 v Bibeault, 1988 SCC

The pragmatic and functional approach

- A pragmatic and functional analysis focuses on whether the legislature intended the question to be within the jurisdiction conferred upon the AT, and requires an examination of:
    - The wording of the legislation that confers jurisdiction on the AT (including the presence or absence of a privative clause).
    - The nature of the problem before the AT.
    - The purpose of the statute creating the AT (the reasons for the AT's existence).
    - The expertise of the AT.

Canada (Director of Investigation and Research) v Southam, 1997 SCC

Reasonableness

- Reasonableness simpliciter: An unreasonable decision is one that is not supported by any reasons that can stand up to a somewhat probing examination, or in other words, if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. This determination requires an inquiry into the evidentiary foundation or the logical process on which the conclusion is based.
- The presence or absence of a privative clause is not necessarily determinative of the standard of review.
    - Note: The courts accepted that a privative clause amounted to a statutory direction from the legislature to defer to the AT's expertise, but the courts also claimed the authority to identify and demarcate the scope of that expertise.

Pushpanathan v Canada (Minister of Citizenship and Immigration), 1998 SCC

The analytic framework

Reformulation of the pragmatic and functional approach

- To determine the appropriate standard of review, the relevant inquiry is whether the legislature intended the question to attract judicial deference, considering:
    - The presence or absence of a privative clause.
    - The AT's relative expertise (most important factor). Three steps in evaluating expertise:
        - Characterize the expertise of the AT.
        - Consider its own expertise relative to that of the AT.
        - Identify the nature of the issue before the AT relative to this expertise.
    - The purpose of the act as a whole, and of the provision in particular.
    - The nature of the problem (question of law, fact, mixed fact and law).
- What is the proper SOR for decisions of the IRB? Must assess, apply, and weigh the four factors:
    - **Privative clause**
        - Finality clause: full privative clause is compelling reason for deference and is preclusive
        - Partial or equivocal: look to legislative intent
        - Statutory appeal: permits more searching review
    - **Expertise**
        - Relative concept
        - Interpret with respect to the aims of the Act
        - Indicated in enabling legislation and interpretation
        - Specialized knowledge of decision-makers
        - Special procedures for dispute resolution
        - Judicial skills and procedures—comparative assessment
    - **Purpose of the act as a whole and provision in particular**
        - Purpose and expertise often overlap
        - Legislative scheme in its entirety
        - Principle of polycentricity informs the purpose
        - Assess whether rights/entitlements are protected/affected
    - **Nature of the problem**
        - Question of law or question of fact or question of mixed fact and law
        - Legislative intent re: questions of law [review 1,2,3]
        - No clear line
        - Generalized proposition of law = correctness
        - Discretionary power
- **Baker's reformulation:** The "pragmatic and functional" approach recognizes that standards of review for errors of law [and discretionary decisions] are appropriately seen as a spectrum, with certain decisions being entitled to more deference, and

others entitled to less…The spectrum of standards of review can incorporate the principle that in certain cases, the legislature has demonstrated its intention to leave greater choices to decision-makers than in others, but that a court must intervene where such a decision is outside the scope of the power accorded by Parliament.

Dunsmuir v New Brunswick, 2008 SCC

The modern approach: the standard of review analysis

Reasonableness will generally prevail, unless the question falls into a category to which the correctness standard continues to apply

Return to a two standard system of review: correctness and reasonableness

The content of the two standards

- The two deferential standards of reasonableness simpliciter and patent unreasonableness are now combined into one standard.
- The appropriate standard of review should be determined by using a two step framework:
    1. The court must first determine whether past jurisprudence has already determined the degree of deference to be accorded with regard to a particular category of question. If so, the inquiry is complete. If not, the court must proceed to the next stage of inquiry.
    2. The court must perform a contextual standard of review analysis articulated around relevant factors, including those identified by the pragmatic and functional approach (it is unnecessary to consider all the factors):
        a. The presence or absence of a privative clause
        b. The purpose of the tribunal, determined from an interpretation of the enabling statute
        c. The nature of the question
        d. The relative expertise of the AT compared to the courts

    Deference, and therefore reasonableness review, *must* apply to:
    - Legal and factual issues that are intertwined and cannot be easily separated.

    Deference, and therefore reasonableness review, *usually* or *may* apply to:
    - Questions of fact, discretion, or policy.
    - Where an ADM is interpreting its home statute or statutes closely related to its function, with which it has particular familiarity.
    - Where an AT has developed particular expertise in the application of a general CL rule in relation to a specific statutory context.
    - Where there is a privative clause, as it is a statutory legislative direction indicating the need for deference.

    Correctness review *must* apply to:
    - Constitutional questions, as they are necessarily subject to correctness review.
    - The determination of "true questions of jurisdiction", which arise where a tribunal must "explicitly determine whether its statutory grant of power gives it authority to decide a particular matter.
    - Questions of general law both of central importance to the legal system as a whole and outside the AT's specialized area of expertise.
    - Questions regarding the jurisdictional lines between two or more competing specialized ATs.
- Reasonableness: A court conducting a review for reasonableness inquiries into the *qualities that make a decision reasonable*, referring both to the *process* of articulating the reasons and to *outcomes*.
    - In terms of *process*, reasonableness is concerned mostly with the existence of *justification*, *transparency*, and *intelligibility* within the decision-making process.
    - In terms of *outcome*, reasonableness is concerned with whether the decision falls within a *range* of possible, acceptable outcomes that are *defensible*, in respect of the facts and the law.
- Correctness: A reviewing court will not show deference to the AT's reasoning process. Rather, it will undertake its own analysis, which will bring the court to decide whether it agrees with the AT's decision. If so, the AT's decision was correct. If not, the court will substitute its own view and provide the right answer.
    - The underlying rationale of the correctness standard is to promote just decision and to avoid inconsistent and unauthorized applications of law.
- **REASONABLENESS** will be the presumptive standard of review when:
    - a specialized or expert tribunal is interpreting its enabling statute;
    - on a question of fact or mixed fact and law OR exercising broad statutory discretion
    - correctly applies all legal principles or tests
    - to construct an interpretation of its statutory powers that falls within range of possible acceptable interpretations
    - resulting in a decision that demonstrates justification, transparency, and intelligibility
    - and produces a reasonable outcome which is defensible in respect of the facts and law
    - Note the importance of **REASONS** in establishing reasonable decision and outcomes

AB (Information and Privacy Commission) v AB Teachers' Association, 2011 SCC

Jurisdiction revisited

- The category of true questions of jurisdiction is narrow and exceptional. When considering a decision of an AT interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness.
- As long as the true question of jurisdiction category remains, the party seeking to invoke it must be required to demonstrate why the court should not review a tribunal's interpretation of its home statute on the deferential standard of reasonableness.

Canada (AG) v Mossop, 1993 SCC

The relevance of statutory interpretation

- **Lamer, Sopinka, and Iacobucci (majority, Diceyan/positivist approach to statutory interpretation)**: The SOR should be correctness. The court is bound by context indicating that "family status" was not intended to encompass same-sex relationships. Sexual orientation was not included in the statute's prohibited grounds of discrimination, contrary to a recommendation by the Canadian Human Rights Commission. The failure of Parliament to act on the recommendation amounted to a refusal to do so. The legislative intent is clear, so the Charter cannot be used as an interpretive aid.
- **La Forest and Iacobucci (concurring, Diceyan/positivist approach to statutory interpretation)**: The SOR should be correctness. The ordinary rules of statutory interpretation require the words used in the statute to be given their usual and ordinary sense, having regard to their context, and to the purpose of the statute. The dominant, and therefore ordinary sense of the word "family", or that which represents the consensus of the Canadian public, is "the traditional family". This is the meaning that must be understood to have been Parliament's intent.
    - Note: La Forest does not emphasize the clear purpose of the *Canadian Human Rights Act*: eradicating discrimination, and instead focuses on his view of the "ordinary" meaning of "family".
- **LHD (dissenting, normative approach to statutory interpretation)**: The SOR should be patent unreasonableness. Even if Parliament intended a specific idea of the scope of "family status", in the absence of a definition in the Act that embodies this scope, concepts of equality and liberty that appear in human rights documents are not bound by the precise understanding of those who drafted them. Human rights codes embody fundamental principles that permit the understanding and application of those principles to change over time, leaving ample scope for interpretation.

Northrop Grumman v Canada (AG), 2009 SCC

Correctness review in practice

- The issue on the appeal was jurisdictional in that it went to whether the CITT could hear a complaint initiated by a non-Canadian supplier under the AIT, and accordingly, the standard of review was correctness.

Canada (Director of Investigation and Research) v Southam, 1997 SCC

Reasonableness review: substantive indicators of reasonableness

Reweighing

- Substantive indicators: A court reviewing a conclusion on the reasonableness standard must look to whether any reasons that can stand up to a somewhat probing examination support it. The defect, if there is one, could be in:
    - The evidentiary foundation itself, such as an assumption or conclusion that has no basis in evidence, or
    - The logical process on which conclusions are drawn, such as a contradiction in the premises or an invalid inference.
- The difference between unreasonable and patently unreasonable lies in the immediacy or obviousness of the defect.
- Reviewing courts should refrain from revisiting the relative weight placed by ATs on the competing factors of relevance to their decisions, although they may insist, as a matter of law, that the At consider all factors of mandatory relevance [typically identified by a purposive interpretation of the statutory scheme].

Law Society of New Brunswick v Ryan, 2003 SCC

Reasonableness review

- Iacobucci: Courts testing for unreasonableness must avoid asking the question of whether the decision is correct. Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness. For example, when a decision must be taken according to a set of objectives that exist in tension with each other, there may be no particular trade-off that is superior to all others. Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.

Canada (Citizenship and Immigration) v Khosa, 2009 SCC

Reasonableness review

Binnie	Rothstein	Deschamps	Fish
FC Act = grounds of review of administrative action which permit relief Deference is the presumptive approach Privative clause signals greater deference Courts not to re-weigh or substitute but determine range of reasonable outcomes Reasonableness is a single standard SofR = reasonableness IAD = reasonable decision	FC Act = standards of review determined by legislature Legislated standards oust the common law Without a privative clause, correctness is the presumptive approach Privative clause signals relative expertise Privative clause signals *Dunsmuir* standard of review analysis P's intent: deference only to findings of fact ∴SoR = reasonbleness IAD = reasonable decision	FC Act = standards of review determined by legislature Legislated standards oust the common law ∴SoR = reasonbleness IAD = reasonable decision Does not sign on to Rothstein's reasoning in Parts I & II	SofR = reasonableness IAD needed to explain its disagreement with the sentencing judge IAD evidentiary finding "incorrect" IAD = Unreasonable decision

SUBSTANTIVE REVIEW AND THE CHARTER

Slaight Communications v Davidson, 1989 SCC
Approaches to review under the Charter

Doré v Barreau du Québec, 2012 SCC
Reasonableness and proportionality

- When Charter values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts, which, as per Dunsmuir, should attract deference. The courts should recognize the distinct advantage held by ATs have in applying the Charter to a specific set of facts and in the context of their enabling legislation.
- Rather than the s 1 Oakes test, a proportionality analysis is required that balances i) the severity of the interference with the Charter interest and ii) the statutory objectives. If the outcome of that balancing falls within a range of possible, acceptable outcomes, then it will merit deference.
- If, in exercising statutory discretion, the AT has properly balanced the relevant Charter values with the statutory objectives, the decision will be found to be reasonable.

Multani v Commision scolaire Marguerite-Bourgeoys, 2006 SCC
Authority to infringe

- Majority, per Charron: the orthodox approach. Following Slaight, s 1 provides the proper methodological framework.
  - An administrative tribunal exceeds jurisdiction if it makes an order infringing the Charter.
  - The standard of review for administrative decisions that apply and interpret the Charter is correctness
    - The Charter may be infringed by: 1) Invalid legislation, and 2) Invalid action taken pursuant to legislative authorization (ie, applying legislation, interpreting legislating, making a decision with respect to an individual case)
    - Both are "prescribed by law" and subject to analysis under s 1
  - If a discretionary decision is not exercised according to its enabling legislation, then it is not prescribed by law and cannot be justified under s 1
  - If a discretionary decision is at issue, the court must determine if the decision falls "within a range of reasonable alternatives" (para 51)
- Deschamps and Abella: the administrative law approach. Same conclusion, but different methodology.
  - **Decisions and orders are not norms of general application; "Law" means only statutes or regulations**
  - The analytic tools developed by each area of law need to be maintained, especially with regard to the attention to expertise
  - An approach that begins with constitutional review must be avoided
  - The changes in the standard of review analysis cannot be disregarded simply because the decision involves human rights
  - The pragmatic and functional approach should be used to determine the standard of review

NS (WCB) v Martin; NS (WCB) v Laseur, 2003 SCC

Agency jurisdiction

Test to determine whether a tribunal has jurisdiction to consider Charter challenges to legislative provisions in their enabling statutes: 1) Look to enabling statute for explicit intent (found in the terms) or implied intent (found by looking at the statute as a whole) on the part of the legislature to confer jurisdiction to interpret questions of law, 2) If such jurisdiction is found, the concomitant jurisdiction to determine constitutional questions is presumed, 3) The onus of rebutting the presumption then rests on the party challenging the tribunal's jurisdiction

- The Constitution is the supreme law of Canada. By virtue of s 52 of the CA, 1982, the question of constitutional validity applies to every legislative enactment.
- A practical corollary to the principle of constitutional supremacy is the idea that Canadians should be entitled to assert their Constitutional guarantees in the most accessible forum available, without the need for parallel proceedings before the courts.
- To allow an administrative tribunal to decide Charter issues does not undermine the role of the courts as final arbiters of constitutionality in Canada.
- Administrative tribunal decisions based on the Charter are subject to JR on a correctness standard. (NOTE: DORÉ CHANGES THIS)
- Additionally, the constitutional remedies available to administrative tribunals are limited and do not include general declarations of invalidity. A determination by an administrative tribunal that a provision of its enabling statute is invalid pursuant to the Charter is not binding on future decision makers, either within or outside the tribunal's administrative scheme. Only by obtaining a formal declaration of invalidity by a court can a litigant establish the general invalidity of a legislative provision for all future cases.
- Administrative tribunals that have jurisdiction, explicit or implied, to decide questions of law arising under a legislative provision are presumed to have concomitant jurisdiction to decide the constitutionality of that provision.
- Explicit jurisdiction must be found in the terms of the statutory grant of authority. Implied jurisdiction must be discerned by looking at the statute as a whole. Relevant factors will include:
    - The statutory mandate of the tribunal in issue and whether deciding questions of law is necessary to fulfilling this mandate effectively;
    - The interaction of the tribunal in question with other elements of the administrative system;
    - Whether the tribunal is adjudicative in nature, and;
    - Practical considerations, including the tribunal's capacity to consider questions of law.
- Practical considerations, however, cannot override a clear implication from the statute itself. The party alleging that the tribunal lacks jurisdiction to apply the Charter may rebut the presumption by pointing to an explicit withdrawal of authority to consider the Charter; or by convincing the court that an examination of the statutory scheme clearly leads to the conclusion that the legislature intended to exclude the Charter (or a category of questions that would include the Charter, such as constitutional questions generally) from the scope of the questions of law to be addressed by the tribunal. Such an implication should generally arise from the statute itself, rather than from external considerations.

Note: We know from Conway that if a tribunal has the jurisdiction to determine constitutional questions, it may also award remedies under s 24(1), although this requires an assessment of legislative intention with regard to the specific types of remedies the tribunal is authorized to award.

THE BC ADMINISTRATIVE TRIBUNALS ACT

Standard of review if tribunal's enabling Act has privative clause

58 (1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.

(2) In a judicial review proceeding relating to expert tribunals under subsection (1)

(a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,

(b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and

(c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

(3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion

(a) is exercised arbitrarily or in bad faith,

(b) is exercised for an improper purpose,

(c) is based entirely or predominantly on irrelevant factors, or
(d) fails to take statutory requirements into account.

Standard of review if tribunal's enabling Act has no privative clause

59 (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.

(2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.

(3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.

(4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion
(a) is exercised arbitrarily or in bad faith,
(b) is exercised for an improper purpose,
(c) is based entirely or predominantly on irrelevant factors, or
(d) fails to take statutory requirements into account.

(5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

Steps:
1. Read the enabling statute.
2. Does the enabling statute incorporate the ATA standards of review? If not, go to the CL. If so, continue.
3. Is there a privative clause? If so: s 58. If not: s 59.
4. What is the type of question? This will determine the appropriate standard of review.
5. If PU, pursuant to s 58 (2)(a), and therefore a question of fact or question of law within exclusive jurisdiction, follow jurisprudential guidance regarding its content: Jensen.
6. If PU, pursuant to s 58 and discretionary (s58(2)(a)), apply definition of PU set out in s.58(3).

Canada (Citizenship and Immigration) v Khosa, 2009 SCC
Codification of patent unreasonableness
Majority, per Binnie (para 19):
- Despite Dunsmuir, "patent unreasonableness" will live on in BC, but the content of the expression, and the precise degree of deference it commands in the diverse circumstances of a large provincial administration, will necessarily continue to be calibrated according to general principles of administrative law.
- That said, of course, the legislature in s 58 was and is directing the BC courts to afford administrators a high degree of deference on issues of fact, and effect must be given to this clearly expressed legislative intention.

Jensen v Workers' Compensation Appeal Tribunal, 2010 BCSC
CL standard of review, post-Dunsmuir
Standard of review if the ATA applies, and there is a privative clause: s 58
- In BC, the CL approach to determining the standard of review has been supplanted by the ATA, with respect to ADMs that are subject to it. Despite Dunsmuir, patent unreasonableness lives on in BC with respect to the provincial administrative tribunals to which the ATA applies.
- Where a tribunal falls under the ATA, a reviewing court must apply the standard of review as set out therein.
- **The ATA does not define patent unreasonableness outside the context of s 58(3), which applies only to discretionary decisions. Therefore, the content of the standard for questions of mixed fact and law is determined by reference to the CL: the patent unreasonableness standard is to be defined by the CL as it existed pre-Dunsmuir. However, it is not frozen as such, and will continue to be calibrated according to general principles of administrative law.**
- Principles informing the standard of patent unreasonableness:
  - Defined by CL immediately prior to Dunsmuir
  - Continues to be calibrated according to general principles of administrative law (Khosa)
  - Decisions that do not accord with reason or are clearly irrational

- Privative clauses require the highest level of deference
- Courts are not to reweigh the evidence, second guess conclusions, substitute different findings of fact, or conclude that the evidence is insufficient to support the result
- The review should be applied to the result, not to the reasons leading to the result
- Decisions should only be set aside where the ADM commits a jurisdictional error
- Decisions based on no evidence are patently unreasonable, but decisions based on insufficient evidence are not
- A high degree of deference is required regarding the reasons offered or that could be offered in support of the impugned decision

Note: Remember that this is only for matters that are not delineated in the ATA.
Note: S 58(3) defines a patently unreasonable discretionary decision.

Coast Mountain Bus v CAW Canada, 2010 BCCA
CL standard of review, post-Dunsmuir
Standard of review if the ATA applies, and there is no privative clause: s 59(1) and s 59(2)

- S 59, unlike s 58, does not address expertise; it is irrelevant.
- By necessary implication, the legislature has mandated correctness under s 59(1) for general questions of law, questions of law before expert tribunals, and questions of mixed fact and law.

BC (WCB) v Figliola
CL standard of review, post-Dunsmuir
Standard of review if the ATA applies, and there is no privative clause: s 59(3) and s 59(4)
As per the ATA, courts must review discretionary decisions on the standard of patent unreasonableness, as defined by the ATA.

DISCRETIONARY DECISION MAKING

Roncarelli v Duplessis, 1949 SCC
Traditional grounds of review

- Traditional grounds of review: improper/unauthorized purpose, omission of relevant factors/consideration of irrelevant factors, bad faith, acting under dictation/influence, wrongful delegation of powers, fettering of discretion, and unreasonableness.

Baker v Canada (Minister of Citizenship and Immigration), 1999 SCC
Modern framework

- The decision was unreasonable: it was reached in a manner that was inconsistent with the values underlying the grant of discretion.
- **Basis for finding of unreasonableness**
  - Approach taken is unreasonable and conflicts with interpretation of humanitarian and compassionate values
  - Failed to consider a relevant or important factor (paras 65, 72)
  - Failed to give this factor "serious weight" (para.65) or "substantial weight" (para 75)

Suresh v Canada (Minister of Citizenship & Immigration)
Deference and reweighing: the intersection of discretion and the Charter
Facts: A provision of the Immigration Act (IA) grants the minister discretion to deport a non-citizen who is deemed to be a threat to national security. The s 7 constitutional issue was whether the minister could exercise this discretion where that person faced a substantial risk of torture. A deportation decision in this context consisted of various sub-questions:

1. What is the meaning of national security?
2. Is the non-citizen a threat to national security?
3. What does torture mean?
4. Does the non-citizen face a substantial risk of torture?
5. Does deportation of the non-citizen to torture violate s 7?

The SCC stated that questions 2 and 4 attracted deference, while question 5 is explicitly subject to correctness.
If the court had said "yes" to question 5 (that deportation to torture violated s 7), then the following determinations could have proceeded sequentially and discretely from one another. If the answer to question 4 was "yes" (that the non-citizen faced a substantial risk of torture), deportation would violate s 7, and if the answer to question 4 was "no" (that the non-citizen did not face a substantial risk of torture), deportation would not violate s 7. Either way, that would have determined the matter conclusively. BUT, the courts answer to question 5 was "no, unless there are exceptional circumstances". The court constrained, but did not eliminate, the discretion to deport to torture, resulting in the *Suresh exception*.
The Suresh exception directed the minister to consider the following additional question:

6. Do the benefits to Canada's national security of deporting the non-citizen outweigh the harm of deporting the non-citizen to torture?

The SCC does not answer the question as to what standard of review would be applicable at this stage.
Casebook:

- ❖ The decision not to prohibit deportation to torture means that a decision-maker, in certain circumstances, possesses the discretion to deport to torture. The exercise of balancing multiple factors usually attracts deference because of its indeterminacy, the interplay of factors, and reluctance to reweigh evidence on review.
- ❖ However, each balancing exercise under the rubric of exceptional circumstances risks the most extreme violation of Charter rights, should the decision-maker be mistaken. It seems inimical to the normative and institutional foundation of the Charter to defer to a minister's own determination of whether his or her discretionary decision violates an individual's Charter rights.

Canada (Director of Investigation and Research) v Southam, 1997 SCC
Deference and reweighing

- ❖ Reviewing courts should refrain from revisiting the relative weight placed by ATs on the competing factors of relevance to their decisions, although they may insist, as a matter of law, that the AT consider all factors of mandatory relevance [typically identified by a purposive interpretation of the statutory scheme].

Doré v Barreau du Québec, 2012 SCC
Reasonableness and proportionality

- ❖ When Charter values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts, which, as per Dunsmuir, should attract deference. The courts should recognize the distinct advantage held by ATs have in applying the Charter to a specific set of facts and in the context of their enabling legislation.
- ❖ Rather than the s 1 Oakes test, a proportionality analysis is required that balances i) the severity of the interference with the Charter interest and ii) the statutory objectives. If the outcome of that balancing falls within a range of possible, acceptable outcomes, then it will merit deference.
- ❖ If, in exercising statutory discretion, the AT has properly balanced the relevant Charter values with the statutory objectives, the decision will be found to be reasonable.
- ❖ **Abella (majority):**
    - So our choice is between saying that every time a party argues that *Charter* values are implicated on judicial review, a reasonableness review is transformed into a correctness one, or saying that while both tribunals and courts can interpret the *Charter*, the ADM has the necessary specialized expertise and discretionary power in the area where the *Charter* values are being balanced.
    - Nevertheless, as McLachlin noted, "reasonableness must be assessed in the context of the particular type of decision making involved and all relevant factors. It is an essentially contextual inquiry"… Deference is still justified based on the decision-maker's expertise and its proximity to the facts of the case. Even where *Charter* values are involved, the administrative decision-maker will generally be in the best position to consider the impact of the relevant *Charter* values on the specific facts of the case. But both decision-makers and reviewing courts must remain conscious of the fundamental importance of *Charter* values in the analysis.

Lake v Canada (Minister of Justice)
Deference and reweighing
Balancing under the P&FA/SOR analysis

- ➢ Previous jurisprudence = deference = reasonableness
- ➢ No privative clause
- ➢ Superior expertise in relation to international obligations and foreign affairs
- ➢ Fact driven inquiry
- ➢ Balance Charter rights against other considerations
- ➢ Minister assesses severity of the infringement
- ➢ Minister take into account relevant factors
- ➢ Does the decision "shock the conscience" of Canadians to extradite?

Reasons

- ➢ [46] As for the adequacy of the Minister's reasons, while I agree that the Minister has a duty to provide reasons for his decision, those reasons need not be comprehensive. The purpose of providing reasons is twofold: to allow the individual to understand why the decision was made; and to allow the reviewing court to assess the validity of the decision. The Minister's reasons must make it clear that he considered the individual's submissions against extradition and must provide some basis for understanding why those submissions were rejected. Though the Minister's Cotroni analysis was brief in the

instant case, it was in my view sufficient. The Minister is not required to provide a detailed analysis for every factor. An explanation based on what the Minister considers the most persuasive factors will be sufficient for a reviewing court to determine whether his conclusion was reasonable.

Weight

- [41] Reasonableness does not require blind submission to the Minister's assessment; however, the standard does entail more than one possible conclusion. The reviewing court's role is not to re-assess the relevant factors and substitute its own view. Rather, the court must determine whether the Minister's decision falls within a range of reasonable outcomes. To apply this standard in the extradition context, a court must ask whether the Minister considered the relevant facts and reached a defensible conclusion based on those facts. I agree with Laskin J.A. that the Minister must, in reaching his decision, apply the correct legal test. The Minister's conclusion will not be rational or defensible if he has failed to carry out the proper analysis. If, however, the Minister has identified the proper test, the conclusion he has reached in applying that test should be upheld by a reviewing court unless it is unreasonable. This approach does not minimize the protection afforded by the Charter. It merely reflects the fact that in the extradition context, the proper assessments under ss. 6(1) and 7 involve primarily fact-based balancing tests. Given the Minister's expertise and his obligation to ensure that Canada complies with its international commitments, he is in the best position to determine whether the factors weigh in favour of or against extradition.